# Introduction : Situating Inter-Legality

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Introduction: Situating Inter-legality

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## 1. Introduction

The current volume aims to explore the idea of inter-legality from one particular perspective: that of the judge. What is a judge to do when confronted with two (or more) rules coming from different jurisdictions, all of them potentially applicable to the case at hand, yet pointing to different substantive solutions? The intuitions underlying this volume, inspired (as intuitions usually are) by some empirical developments are, first, that judges are increasingly confronted with such situations, and second, might increasingly be inclined in such cases no to resort to solutions on a purely formal basis (Is one of the legal orders concerned hierarchically superior? Is one of the rules concerned hierarchically superior?), but rather on a more substantive basis, aiming to justice in the case before them. In different and simultaneously more and less abstract terms, confronted with a conflict between rules stemming from, say, international law on the one hand and a particular domestic legal system on the other, judges are increasingly inclined not to decide on the basis of international law being superior or inferior, but on the basis of asking themselves what best serves justice in the individual, particular case.

This is made possible precisely by being 'casuistic', in the non-pejorative sense of the term.[1] A focus on individual cases, with their particular characteristics, does not demand that the judge possesses and commands a thick background theory of justice; it only requires, more modestly, that a judge (or college of judges) is able to distinguish between several possible outcomes which ones would be more just, more fair, more equitable. Hence, inter-legality is a highly contextualized and pragmatic setting, philosophically to be associated with Aristotle rather than Kant, Dewey rather than Rawls. There are no doubt outstanding philosophical questions that remain to be answered, but these are less heavy, less impeding of practices, than if the demand were to apply a theory of justice – for it seems ascertainable that no theory of justice has met with general acceptance.

The perspective chosen is that of the judge. This is not done in order to sanctify the position of judges or because, as many may think, 'law is what judges do', but has different motivations. The most important of these is purely heuristic: judges are, generally speaking, under an obligation to decide in accordance with the law, and only in accordance with the law. Where the policy-maker can and often must take other considerations into account (social consequences, economic feasibility, ethical plausibility, political acceptability), the textbook judge operates under no such constraints. Hence, for testing an idea in the sphere of law, the courts and their judges offer a more isolated laboratory than many other settings.

The ramification is that our conception of inter-legality, at least for present purposes, differs from the conception used as used by others. To us, inter-legality offers a legal solution (a solution embedded within the law and justified by the law) to certain practical questions. It does not offer a political solution, to be taken by

[1] See e.g. the conception endorsed (if not invariably under the label 'casuistry') by Stephen Toulmin, *The Place of Reason in Ethics* (Chicago Il: University of Chicago Press, 1986 [1950]).

legal actors, but instead offers a solution based on law. Put differently: the judge in inter-legality does not step outside the law (as in many versions of legal pluralism), but stays within its limits.

Another ramification is this: for purposes of this volume, inter-legality is not a matter of discontented individuals and groups being able to seek the jurisdiction most favourable to their claim (although, as will be discussed below, the term was probably conceived with this in mind by its *auctor intellectualis*). Indeed, in an important sense, for us such is not a realistic possibility, for the very point of inter-legality is that the law will indicate the solution to a dispute, not by choosing from among various equally just solutions, but by pointing out which one is the more just. And if that is so, then 'forum-shopping' becomes a risky activity for the forum-shopper.

This introduction will discuss the emergence of inter-legality against the background of the heated, intense but short-lived constitutionalization discussion that pre-occupied international lawyers in the first decade of the 2000s[2], based on the thought that while the discussion died away, some of the questions it attempted to answer remained, and are better seen as emanations of inter-legality (section 2). It will move on to a discussion of the launching and reception of the term 'inter-legality' and the pioneering work of the Court of Justice of the European Union in giving effect to it, in particular in its case-law on external relations, as well as brief discussion of some of the overlaps and linkages with similar notions (pluralism, constitutionalism, fragmentation – section 3). Section 4 introduces the contributions to this volume.

## 2. Constitutional Inspirations

About a decade ago, international lawyers – and many domestic lawyers with an interest in public affairs - were in the grip of a seemingly new idea: the idea that the international legal order could be seen as a constitutional order. The idea had many inspirations. For some, constitutionalization was the answer to fragmentation of international law, widely seen as a threat to the integrity of the system – constitutionalization would be the glue to hold the fragmenting system together. For others, it marked the liberal end of history, with a world finally united on the basis of shared values, typically western civil and political rights, or even the ordo-liberal rights to trade, own property and do business. For a third group, the constitutionalization of international law finally made good on a classic promise, uttered by the likes of Pufendorf and Wolff and resurrected in the twentieth century by Verdross and others. A fourth group felt that constitutionalization might provide an answer to all sorts of challenges: the sources challenge (What is international law and how do we tell it when we see it), the subjects challenge (Who is actually making international law), the enforcement challenge (Is international law really law if it is not enforced?) and the ontological challenge (Is international law, indeed and again, this time as a philosophical matter really law?). And a fifth group embraced constitutionalization as an ideology, required to accompany that other great ideology of globalization. For in a globalizing world without a state, as someone might have put it, something was needed to sell the idea – and that something could be constitutionalization.[3] Indeed, the election of Donald Trump in the United States and the Brexit decision in the United Kingdom may well be signs that the salesmen have stopped their work: globalization meets with

[2] See generally Jan Klabbers, 'Constitutionalism as Theory', in Jeffrey L. Dunoff and Mark Pollack (eds.), *International Legal Theory* (forthcoming).

[3] See generally Jan Klabbers, 'Setting the Scene', in Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford University Press, 2009) 1-44.

resistance because it is not met with a partner discourse to legitimize it beyond the unsubstantiated claim that globalization makes us all better off, that 'a rising tide lifts all boats', neglecting the awkward circumstance that some boats are lifted far higher than others. And for many, of course, constitutionalization answered several of these challenges at once.

And yet, it seems the conversation has come to a complete stop – who won? International lawyers debate all sorts of things these days, but they do not debate constitutionalization. So what happened? Why has constitutionalization seemingly disappeared completely? Obviously, the different attractions have met with different sorts of disappointments. Die-hard liberals may have started to realize that human rights, even if universal, may be contextual, and may be just a little too open-ended. They may have even started to realize that human rights come with their own bureaucracies which may not always be unequivocally good or human-rights oriented. Those who worried about fragmentation may have stopped worrying a little; they may have been appeased by the invention of the principle of systemic integration laid down in the Vienna Convention, and they may have found that the world does not collapse if trade lawyers and environmentalists talk past each other.[4] This may be inconvenient, but hardly cause for hysteria. Those who re-imagined a *civitas mundi* may still be working on their re-imagining, and if globalization has lost some of its glamour, so has constitutionalization.

But perhaps the main reason is that most of the attempts to look for constitutionalization aimed to posit a thick, monolithic version of constitutionalization, implicitly (and sometimes explicitly) based on global unity, on a worldwide convergence of values. This now has proved fallacious, as various theorists have pointed out. The world is a pluralist place, with pluralism existing on various levels, from the epistemological pluralism identified by someone like Neil Walker[5] and the conceptual pluralism of the philosophers[6] to more mundane pluralities spotted by Nico Krisch.[7] So, it turned out, much of the debate was based on false premises, on the false premise of planetary unity, happily ignoring or at least downplaying clashes of civilizations, happily ignoring above all perhaps the political economy of (international) law: whatever is done, whatever is proposed, it comes with winners and losers, and the identity of those groups remain remarkably constant over time. Political decisions are rarely 'neutral'; they tend to have distributive effects, even if sometimes unintentionally so. The West wins – and would have gained most from constitutionalization, cementing western values and western political practices. And the global South loses – and continues to lose.[8]

Still, while constitutionalization did not answer many questions and the entire decade-long debate may have been based on false premises, nonetheless it did tap into something real and of significance. And the real and significant thing it tapped into was the idea that it is no longer clear who exercises international authority, how authority is exercised, and with what justification. Clearly, the old Westphalian state-system, built around keywords such as sovereign equality, national democracy, dualism, hierarchy, and state consent, did no longer

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[4] The principle of systemic integration was popularized upon the discovery of article 31(3)(c) of the Vienna Convention on the Law of Treaties, suggesting that in interpreting a treaty, all rules of international law applicable between the parties ought to be taken into consideration. See Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission* (Helsinki: Erik Castrén Institute, 2007).

[5] See Neil Walker, *Intimations of Global Law* (Cambridge University Press, 2015).

[6] See Hilary Putnam, *Ethics without Ontology* (Cambridge MA: Harvard University Press, 2004).

[7] See Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, 2010).

[8] For a forceful critique, see B.S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches*, 2nd edn. (Cambridge University Press, 2017).

do the trick. Authority, so we started to think, could come from all angles and directions, and seemed increasingly problematic to legitimate. If traditionally states could claim legitimate authority based on their internal structures, and international law could claim legitimacy because it was made by those same states and by definition and necessity based on their consent, this story no longer held good. It could not explain why all of a sudden banking standards would be set by the highly selective (and self-selective at that) Basel Committee and in the form of guidelines rather than legal rules. It could not explain the legal significance of 'standards' developed by the International Organization for Standardization (ISO), or the Forest Stewardship Council, or the private agreement between workers and employers concerning safety in the garment industry. It could not explain why states would get all worked up whenever the OECD would publish its annual PISA rankings – not even recommendations, but mere rankings. It could not explain how athletes convicted of doping use by their own sports governing bodies could appeal to national or supranational tribunals.[9] And it could not explain why individuals would be bound to respect sanctions imposed on them by the Security Council, all the more so if those sanctions were taken in disregard of fundamental norms prevailing in their own political communities.

In other words, behind the challenges mentioned above lay another, deeper and possibly more fundamental issue: how to come to terms with changing patterns of authority and legitimation in international law? In particular, what to do with norms coming at us from various directions, from various legal systems or more broadly from various normative orders (law, ethics, social customs, religion)? If there was one thing constitutionalization promised, it was the idea of hierarchy and order: the wide variety of norms could fall into place in a constitutional global legal order, with some at the apex and others below it, following some hierarchical pattern or others. Obviously, one might quibble (and one might expect there to be quibbles) about which norms would occupy which positions, but the long and the short would be that constitutionalization circa 2006 offered a glimpse of a well-arranged international legal order, with a beginning, a middle, and an end – and in that order too.

This promise, needless to say, has not materialized, but the problematique has not been resolved either. In fact, it has only become more visible. The *Kadi* decision of the Court of Justice of the European Union (CJEU) CJEU in 2008 illustrated things nicely, presenting the intricate interdependence between three distinct legal orders (the international, the EU, and the national) and, what is more, suggesting that old solutions would no longer be workable. For at the end of the day, none of the options would do justice to all factors concerned. Honouring the Security Council would have come at the expense of human rights; honouring Swedish law would have meant ignoring Sweden's EU obligations; and honouring EU law, as the CJEU eventually did, ended up ignoring international law – and not just any international law, but the law relating to peace and security, hierarchically often considered superior to the law of the EU's member states by virtue of article 103 UN Charter.

The *Kadi* case hit a nerve – in fact, it hit several nerves; few judicial decisions have occupied so many legal minds in recent years as the *Kadi* decision. And yet, for all the hoopla, *Kadi* too has fizzed out, much like the constitutionalization debate, perhaps because the saga kept continuing, or perhaps because the Security Council somewhat improved its human rights sensibilities. Curiously though, the very circumstance made so visible by *Kadi* (the interdependence between legal orders) has largely been left unexplored. There has been much debate about technicalities, and much searching for practical solutions in terms of hierarchy, with some advocating formal hierarchy ('Surely the Charter should prevail') and some advocating the opposite ('Surely

[9] On this problematique, see Jan Klabbers and Touko Piiparinen (eds.), *Normative Pluralism and International Law: Exploring Global Governance* (Cambridge University Press, 2013).

human rights should prevail'; 'Surely the Security Council may be disobeyed'[10]), and some looking further into review procedures and their relative merits and de-merits.[11] But little attention has been paid to the circumstance that perhaps *Kadi* was not an incidental case bringing a strange and unusual configuration to the fore, but could rather represent 'the new normal'. And yet, this is precisely what *Kadi* represents: the inter-wovenness of legal orders is not unique and special anymore, but rather represents a quite common state of affairs.

More recent cases confirm this state of affairs, in various ways. Human rights lawyers may think of the 2016 *Al-Dulimi* decision of the ECtHR, confirming the interdependence between the UN, European and Swiss legal orders. Investment lawyers may be reminded of the *Yukos* saga, decided by an international arbitral panel but subsequently set aside by a Dutch court – appeal is pending at the time of writing - and involving issues of procedural and substantive international, Russian and Dutch law (and that is not even counting related proceedings taking place before domestic courts in various other national jurisdictions). Italy's Constitutional Court saw fit not to give effect to a decision of the International Court of Justice, and saw fit to justify this by claiming to protect the integrity of international law itself. And the US Supreme Court did much the same in *Medellín*, but this time claiming to protect the integrity of US domestic law. This short list of examples makes clear that various legal systems can come into uncomfortably close contact with one another, and makes clear that those various legal systems can each of them claim supremacy over the competing legal orders. And these are just examples drawn from legal orders whose legal status no one would deny – the examples do not even involve soft law, or normative systems not everyone would consider as 'law'.

## 3. Inter-legality in Thought and Action

Probably the first to use the term 'inter-legality' was the Portuguese legal sociologist Boaventura de Sousa Santos, during a keynote lecture presented some thirty years ago. Santos did not, however, do much with the word: He noted that inter-legality was a dynamic process due to the circumstance that 'different legal spaces are non-synchronic', but his main contribution was the coining and description of the term. He observed, three decades ago, that we should start to conceive of law as 'different legal spaces superimposed, interpenetrated and mixed in our minds, as much as in our actions', explaining that we 'live in a time of porous legality or of legal porosity, multiple networks of legal orders forcing us to constant transitions and trespassing.' And this was different, so he warned, from what legal anthropologists had traditionally referred to as legal pluralism, for legal pluralism suggests much more a side-by-side existence of legal orders coexisting in the same space.[12] For Santos, inter-legality posed not so much a challenge as an opportunity: the porosity of legal orders would allow people to pick and choose which legal order to employ, and typically, they would employ the one most in tune with their claims or grievances.

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[10] See, e.g., Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford University Press, 2011).

[11] See Devika Hovell, *The Power of Process: The Value of Due Process in Security Council Sanctions Decision-Making* (Oxford University Press, 2016).

[12] Boaventura de Sousa Santos, *Toward a New Legal Common Sense*, 2nd edn., (London: Butterworths, 2002), at 437. The chapter was first separately published in 1987. See also Andreas Fischer-Lescano and Gunther Teubner, *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts* (Frankfurt am Main: Suhrkamp, 2006) 34-40, distinguishing inter-legality from traditional legal pluralism.

The notion of inter-legality was picked up by William Twining on various occasions, but again without doing much with it. In his *Globalization and Legal Theory*, Twining suggests that it might provide a useful framework for further research, and then presents something of a broad outline before delving into a different debate.[13] And in a more recent brief article, Twining devotes some attention to classifying inter-legality, making three points (but alas making them rather briefly). First, he notes that neither change nor stability is presupposed in inter-legality. Second, he observes that different orders or spaces can live in conflict but also in harmony with each other. And third, he suggests that the different legal spaces may be relatively open: they behave more like waves or clouds than like billiard balls.[14] All three seem apposite, with other authors, more pragmatically and more doctrinally oriented, having suggested that e.g. much international law depends on national law for its implementation, and that thus international and domestic law can together build a strong legal argument in favor or against particular practices.[15]

Santos' inter-legality may be a useful term, but it may be helpful to specify wherein its utility may lie. We take it that the term refers mostly to situations where actors are confronted with a variety of norms stemming from a variety of legal orders (or spaces), and all validly applicable in principle. If these all point in the same direction, then fine. The more interesting cases however are where these do not point in the same direction. Thus, Mr Kadi enjoyed certain rights under EU law (derived from both EU law and the human rights obligations of its member states), but a different set of rules emanating from the Security Council intervened with the enjoyment of these rights. In Italy, Mr Ferrara thought he had certain rights against Germany, valid under Italian law but, as the ICJ held, unenforceable against Germany under international law – something Italy's Constitutional Court found difficult to swallow. The defining elements for inter-legality to operate then are threefold. One, it must concern a variety of norms from different systems; second, these are all valid within their own legal spheres; and third, they are in principle all applicable to a particular set of facts. Hence, inter-legality involves a choice for the application of one set of rules over another, equally valid, set of rules.

It is perhaps useful to point out that inter-legality does not, in and of itself, clarify much about what others refer to as transnational law: it may be the case that there is law originating from, say, the Basel Committee, or that what some deem 'soft law' is really hard law under a different name, but this is not something inter-legality addresses. It works, so to speak, on existing ontological foundations of law, but does not amend these as such. In other words: it speaks to contacts between legal orders or spaces, but does not itself decide what counts as a legal order. It aims to describe and perhaps explain legal relations, not legal orders or systems or spaces. In this sense, its next of kin are the classic doctrines of monism and dualism (more on these below).

Yet, monism and dualism are no longer sufficient. For one thing, both doctrines were always premised on the thought that there were only two relevant legal spaces to consider: the international and the national. This is no longer tenable, with different legal orders in-between asserting a role: this applies to EU law, but also, quite separately, to the European public order established under the European Convention of Human Rights. And while Europe might be most pronounced here, the matter is not limited to Europe: one may discern an American public order based on the Inter-American Convention of Human Rights; UN missions in Africa are

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[13] William Twining, *Globalisation and Legal Theory* (London: Butterworths, 2000), at 230.

[14] Twining, 'Diffusion and Globalization Discourse', (2006) 47 *Harvard International Law Journal*, 507-513, at 513. The piece is perhaps best-known for his wry observation that he aspired to start a Self-Critical Legal Studies Movement - probably without much success (at 511).

[15] See e.g., Jeff King, *The Doctrine of Odious Debt in International Law: A Restatement* (Cambridge University Press, 2016), demonstrating that some international rules require the help of domestic law in order to be enforced.

often intersected by regional organizations such as the African Union or ECOWAS – it is too simple, these days, to merely proclaim the relevance of the national and the international.

To this a second factor may be added: it is likewise too simple these days to invoke notions of normative hierarchy in order to decide which law should be applied to which set of circumstances. There are various reasons why this is so. First, it is increasingly realized that facts rarely speak for themselves; instead, they require some kind of classification before they can meaningfully be discussed, and even then, our language is often an impediment, in that neutral classifications are often out of reach.[16] This classification is a human act, and thus a political act: hence, the so-called 'politics of framing' assumes increasing relevance. The upshot of this is that the validity of a particular legal approach is only ever provisionally accepted: applying *this* norm to *these* facts is only accepted if the result is not too obnoxious. Should the result be obnoxious, then the legitimacy of the earlier decision dissipates, and it will be suggested that a different frame should have been applied. Thus, approaching the HIV/Aids problematique as a matter of intellectual property law is not problematic *per se*, provided it results in a decent solution. If not, people will suggest it should have been approached as a health issue, or a human rights issue, or perhaps even a security issue.[17] Where in earlier days frames were by and large uncontested, this is no longer the case, and the contestability of the frame sets additional normative demands on the law. The legal solution must not only be technically competent (proper, solid application of intellectual property law to aids medication), but also be considered normatively acceptable, for when other frames are available, the chosen frame must be able to convince on grounds of fairness or justice – lest it be considered a mere exercise of naked power.

Again, the *Kadi* case is a useful illustration. Technically, it would have been perfectly acceptable for the CJEU to declare the supremacy of the UN Charter, and ignore human rights standards – in fact, the argument could be made that technically, this would have been the most warranted solution, with the EU institutions simply implementing verbatim a Security Council resolution adopted in the fight against global terrorism – and if this results in human rights violations for the individuals blacklisted, then the onus is on the Council to get its act together, but not on the implementing entities to prevent implementation. Or so the argument could have gone.

And one of the reasons why it is no longer considered possible to simply apply notions of hierarchy and 'damn the torpedoes', is the inexorable rise of the individual, or humanity, as the 'alpha and omega of international law', as it has recently been put.[18] What we mean by this is not the sterile position which says that the individual has become a subject of international law – this means very little in the absence of concrete rights and obligations. Nor do we mean to say that the rights of individuals are trumps in any Dworkinian sense – obviously, they are not, and should not be. But what is of relevance is the realization that even if much international law is made by states to regulate relations between states, and even if much of this takes place within international organizations, nonetheless most of this international law ends up affecting individuals one way or another. Put differently, there are actually not that many substantive rules of international law that only apply to states in their international relations: there are the rules on diplomatic relations, and arguably rules on aggression and self-defense, but many rules of international law these days directly or indirectly,

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[16] See Friedrich V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge University Press, 1989).

[17] The example is derived (with some liberties) from Andreas Fischer-Lescano and Gunther Teubner, *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts* (Frankfurt: Suhrkamp, 2006).

[18] See Anne Peters, 'Humanity as the Alpha and Omega of Sovereignty', (2009) 20 *European Journal of International Law*, 513-544.

actually or potentially, affect individuals and legal persons. This is obviously the case with human rights law, refugee law and the like, but applies equally to trade law, or investment law, or the law of the sea.

This has, arguably, always been the case, and it is possibly no coincidence that early observers of the first international organizations, in the nineteenth century, already captured glimpses of 'Weltrecht' (or 'global law') in entities such as the International Copyright Union.[19] Likewise, it is on reflection rather nonsensical to think of the work of the International Labour Organization as somehow unconnected to the rights of workers, or that the economic and social activities of the League of Nations would be limited to state relations only[20]: the interdependence of international and domestic law has remained hidden behind a layer of misguided International Relations Realism; and as so often, the lawyers have stopped thinking and simply embraced the Realist assumptions.[21]

The upshot is, that it is no longer considered acceptable if and when the law is applied in such a way as to negatively affect individuals. As Italy's Constitutional Court suggests, even the law on state immunity – traditionally the epitome of a state-centric international law – will come to affect individuals, and if that is the case, it should be applied with a sensitivity to the plight of those individuals. In this case, it concerned an Italian who had been forced to hard labour under the Nazi regime, and eventually started proceedings against Germany in Italy's courts. Germany went to the ICJ and invoked sovereign immunity, something the ICJ honored, making a facile distinction between procedural rules (immunity) and substantive ones (slavery and forced labor) and suggesting that prioritizing the procedural rule would in no way diminish the value underlying the substantive rule. But this, as Italy's Constitutional Court intimated, is no longer acceptable, as it cannot be reconciled with the very values underlying, and recognized by, international law.

Hence, as it turns out, the individual is central to much of domestic law, and to much of international law as well (and EU law). As a result, the law that gets to be applied, so the argument seems to go, should be the law that actually is helpful to the individual, if necessary against the interests – and legitimate rights – of others. In yet other words, it is not the case that the law goes for a solution based on formal hierarchy; nor even is it the case that it goes for a solution based on substantive hierarchy; instead, what one sees emerging is a pragmatic analysis of the facts of the case based on, one might say, the epistemological priority of the individual. What matters is to do justice in individual cases, regardless of reflections about normative hierarchy. Notions of supremacy or *jus cogens* may come in to bolster the legal argumentation, but are not central to it (and, frankly, will mostly obscure matters at any rate). What is central, instead, is the position of the individual – it is the individual who has become the 'constitutional irritant' of each and every legal order.[22]

It follows that our classic notions of monism and dualism are no longer particularly useful, a circumstance recognized by pluralists; intuitively, it is assumed that legal orders move from one to two to many: from monism to dualism to pluralism. Intriguingly however, it may well be this rests on a cognitive path dependency. Historically, at any rate, the sequence seems to have gone differently: the leading dualist, Heinrich von Triepel,

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[19] See Friedrich Meili, *Die internationalen Unionen über das Recht der Weltverkehrsanstalten und des geistigen Eigentums* (Leipzig: Duncker & Humblot, 1889).

[20] The impact of the ILO on domestic affairs is well-sketched in Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford University Press, 2017).

[21] This is a recurring phenomenon: international lawyers have tended to be in awe of Realists, for no other reason than that Realists have tended to shout loudly that they know that all is about power, and thus all should listen to them.

[22] The notion of 'constitutional irritant' is gratefully borrowed from Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press).

posited his dualism well before[23] the leading theoretical monist (Hans Kelsen) responded[24], and it is often also conveniently forgotten that Triepel presented his dualism not so much as a normative claim, but rather a an empirical claim: since, in his days, international law and domestic law were regarded (not always plausibly perhaps, but that is beside the point) as rarely meeting, dualism presented a convincing story, and it made sense to insist on the need to transform the commands of one legal order – the international - into commands recognized by the other – the domestic - insofar and to the extent that the subjects of the domestic order could directly be affected by the international order. Triepel himself held that such commands hardly existed, but acknowledged the possibility that the minority treaties, a recent phenomenon at the time he returned to the issue in the 1920s[25], might grow into instruments of international law directly affecting domestic law – a position that would be strengthened a few years later by the analysis of a 'Beamtenabkommen' by the Permanent Court of International Justice a few years later.[26]

In short, historically the sequence was not 'one, two, many', but rather counted backwards starting from two, and then the question is what follows after 'one'. We posit that what follows is not pluralism as commonly understood, but a different form of monism – inter-legality. If classic Kelsenian monism posited the existence of a single legal order with different branches and with one of these – the international – being hierarchically superior as a matter of form[27], our claim, in a nutshell, is that such hierarchical supremacy cannot be issued as a matter of form or descent, but has to be earned. In a world of inter-legality, courts will apply those rules which they will deem most conducive to doing justice in the individual case. This will sometimes be a rule of international law; and sometimes it will be a rule from domestic law, or EU law, or any other appropriate legal order as may be identified.

Two points needs to be emphasized. First, few developments move in linear ways, from a concrete starting point without interruption to a concrete end point, and the same applies to inter-legality. There are enough decisions where courts will not put a premium to doing justice in the individual case, but rather in favour of other interests, whether those of other actors or interests those courts will deem to be systemic. In the long run, this will matter: if courts systematically end up not doing justice in cases crying out for inter-legality, then our ideas will be falsified. But it is too early to tell. We think we have identified something that could come to be a useful way of understanding what courts will do in cases where various conflicting commands may be present, and this volume contains our preliminary findings and attempts, with knowledgeable colleagues, to think things through.

The second point is related: this volume is set up not so much as a normative proposal, but rather as explanatory theory. Admittedly, in legal matters the descriptive and the normative are never strictly separate, and the same applies here: to our minds, it is probably not a bad thing if our intuition proves credible. But clearly, as a normative theory, some important elements are lacking, not least a working concept of the sort of

[23] Triepel wrote his main work at the close of the nineteenth century, around the time Kelsen graduated from Vienna's gymnasium. See Heinrich von Triepel, *Völkerrecht und Landesrecht* (Leipzig: Hirschfeld, 1899).
[24] Kelsen's monism was developed at some point in the 1910s, but is set out with clarity in Hans Kelsen, *Principles of International Law* (New York: Rhinehart and Co., 1952).
[25] See Heinrich von Triepel, 'Les rapports entre le droit interne et le droit international', (1923) 1 *Recueil des Cours* 75-121.
[26] *Jurisdiction of the Courts of Danzig*, advisory opinion, [1928] Publ. PCIJ Series B, no. 15.
[27] Kelsen's monism has been linked to his social-democratic cosmopolitanism in the splendid study by Jochen von Bernstorff, *Der Glaube an das Universale Recht: Zur Völkerrechtstheorie Hans Kelsens und seiner Schüler* (Baden-Baden: Nomos, 2001).

'justice' that may be involved in 'doing justice in individual cases', and whether or not such a concept could meet with universal or near-universal approval.

The epistemological priority of the individual and the emphasis on doing justice in individual cases has been pioneered, it should be acknowledged, by the CJEU, in particular in its case-law on external relations. Here, observers have long engaged in sterile debates about whether the EU is friendly disposed towards international law, or rather unfriendly disposed; whether it should be seen as monist or dualist in its case-law on the effect of international law in the EU legal order. In this debate, observers have often been puzzled by the apparent systemic (and systematic) inconsistencies in the case-law. Many have suggested that the CJEU was essentially monist, except when it comes to particular treaties, especially perhaps GATT/WTO law. But if so, some relatively recent decisions (including *Kadi*) do not fit the bill, which has prompted observers to identify a shift.[28] Other observers, myself included, have rather considered the CJEU protective of the EU legal order, and I still maintain that this is the better view, but it deserves a nuance or two.[29]

The first nuance is one of self-image: the EU thinks of itself as a nice liberal order and, among international entities, has a very well-developed mechanism in place on the judicial protection of individual rights and interests, while its substantive law can also often be said to be oriented towards protection of the individual. Hence, it is understandably reluctant to allow this to be interfered with from the outside, for instance by incorporating international law without asking any further questions. After all, it is possible that the protection offered by international law is less than that offered by the EU – so why settle for less? This applies for instance to such things as passenger rights related to air travel, to maritime issues, or aspects of environmental protection.

The second nuance is related: it is by no means incompatible with the desire to protect the EU legal order that individual protection should be at a premium: it may be expected that those whose interests the EU protects will see the EU in a good light, express their support and loyalty and therewith help to boost the legitimacy of the integration project. In other words, by prioritizing individual protection the CJEU kills two birds with one stone: it protects the individual and does justice in the case before it, and at the same time enhances the legitimacy of the political project it is a part of. If it is accurate to claim, along vaguely Weberian lines, that legitimacy is the scarcest political currency, then resorting to inter-legality may well help to legitimize the role of judges and their political authority.[30]

Inter-legality has little to do with constitutionalism if constitutionalism refers to any kind of formal constitutional act. There is no treaty ordaining inter-legality (and article 31(3)(c) of the Vienna Convention on its own is insufficient), no domestic public law (although some rules and treaties may contain a *renvoi*), no basic instrument – although there are some cases from various jurisdictions, grappling with similar issues and seemingly pointing in the same direction. Likewise, there is little connection between inter-legality and any notion of formal hierarchy, as so often associated with constitutional thought. Indeed, formal hierarchy is

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[28] See Gráinne de Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*', (2010) 51 *Harvard International Law Journal*, 1-49.

[29] See Jan Klabbers, 'Straddling the Fence: The EU and International Law', in Anthony Arnull and Damian Chalmers (eds.), *The Oxford Handbook of European Union Law* (Oxford University Press, 2015), 52-71. See also Mario Mendez, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques* (Oxford University Press, 2013).

[30] Some connections between judges and legitimacy are fleshed out in Jonathan Soeharto, *The Integrity of the Judge: A Philosophical Inquiry* (Farnham: Ashgate, 2009).

anathema. Part of the point of inter-legality is to counter ideas about formal hierarchies, and instead do justice in individual cases, regardless of issues of formal hierarchy.

Much the same applies to substantive hierarchy - albeit perhaps to a lesser extent. To the extent that constitutionalism is based on particular values, inter-legality ignores this particular terminology, knowing all too well that values may clash, and that much depends on who gets to articulate them with authority at any rate.[31] This is the point where many liberal constitutionalist international lawyers have gone wrong and shot themselves in the foot: the true liberal cannot rank values without becoming incoherent, with the result that either all values are constitutional, or none are. Either way, the notion of constitutionalism does little work.

More inductive analysis is of little help. It is one thing to say that international lawyers recognize the idea of *jus cogens* norms and obligations *erga omnes*, but these too may clash, or even be set aside by invoking an awkward distinction between procedure and substance, as the *Ferrara* case illustrates. But that said, there is one point perhaps where values come in, and that is the value of doing justice in individual cases. The point to note though is that this seems to be unrelated to any official notions of hierarchy, whether these are based on formal indicators or substantive ones. Few people would hold that consumer protection is a matter of *jus cogens*, and yet it is possible to discern different levels of protection and prioritize the legal system offering the higher level over the one offering the lower level – there is no need to resort to concepts of *jus cogens* or obligations *erga omnes* to justify such a move. At best, perhaps it can be said that recognition of a norm as belonging to such a category creates a prima facie assumption that the right it protects should indeed be protected – such seems to be the assumption underlying the decision of Italy's Constitutional Court. But even so, few rules have been identified as being of *jus cogens* nature by general acclamation, and even with those rules much depends on framing. The International Court of Justice has thus far only held that the prohibition of genocide is captured by the idea of *jus cogens*, yet even the planned slaughter of more than a million people for reason of their ethnicity, as the European Court of Human Rights unwittingly demonstrated not so long ago with respect to the Armenian genocide of 1915, is far from certain to be characterized as genocide, judging by a fairly recent decision of the European Court of Human Rights.

In retrospect, it seems clear that the debate on the constitutionalization of international law bit off far more than it could chew. Constitutions are normally supposed to be doing several things (setting up a political community and deciding who is in and who remains out, setting up checks and balances between the institutions of government, setting out a procedure for law-making, protecting some basic values perhaps), yet the very idea of international law doing all this seems, in retrospect, rather over-ambitious. Equally in retrospect, the over-ambitiousness may well have been inspired by the overwhelming nature of the issues (globalization, fragmentation, deformalization), and for a brief moment, constitutionalization must have looked like the miracle cure, the snake oil that would cure all evils all at once. In retrospect, it is no surprise that constitutionalization failed with a bang.

But what is left among the debris is a valuable idea, taken up by entrepreneurial courts and developed a little, case-by-case, incident by incident, without grand labels and grand designs: in a world where classic models of authority have all but disappeared, where law-making takes place in uncoordinated ways across and between networks, where traditional notions of legal responsibility can do little work because it is unclear who is responsible for what, in such a world the best one can hope for is that legal decision-makers are inspired to do

[31] Values are, moreover, rather ephemeral: Hannah Arendt long ago observed that people can shed their values seemingly at will as soon as something else comes along. For good discussion, see Elizabeth Meade, 'The Commodification of Values', in Larry May and Jerome Kohn (eds.), *Hannah Arendt: Twenty Years Later* (Cambridge MA: MIT Press, 1996), 107-126.

the right thing, whatever exactly the right thing may be. In a pluralist and networked world, it may be difficult to recognize what would command general respect, but at least it is sometimes obvious what would command general abhorrence.[32] Syria using chemical weapons on Syrians is wrong, regardless of whether Syria is under a legal obligation to abstain from using chemical weapons; UN peacekeepers bringing cholera to Haiti is wrong, regardless of whether the blame ultimately rests with the UN, with the Nepalese authorities, with the rich UN member states insisting on involvement of the private sector in order to give expression to their market ideology, or with the Haitian sub-contractors. Shielding a state from liability for slavery by invoking state immunity is wrong, as is invoking the authority of the superior order when denying people access to local justice when they find themselves blacklisted by the Security Council. Where legal spaces interact and intersect, the only possible guideline should be the plight of the people affected – the only possible guidelines can be a combination of a deep, intuitive sense of justice and what Aristotle referred to as *phronesis*, i.e. practical wisdom.

## 4. The Essays in this Volume

[32] See Jan Klabbers, 'From Sources Doctrine to Responsibility? Reflections on the Private Lives of States', in Pierre d'Argent, Béatrice Bonafé and jean Combacau (eds.), *The Limits of International Law: Essays in Honour of Joe Verhoeven* (Brussels: Bruylant, 2015), 69-85.